IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1528 OF 2007

M/s.Bhram Shrusti Real Estates
Co. Pvt.Ltd. ..Petitioner.

V/s.

Vishnu Shankar Datar & Ors. ..Respondents.

Shri S.R.Mishra for petitioner.

Mr.P.M.Mokashi for respondents.

CORAM : ABHAY S.OKA, J.

DATED : 13th APRIL, 2007.

P.C. :-

Rule. The learned advocate appearing for the respondents waives service. Taken up for hearing forthwith.

2. By this Writ Petition under Article 227 of the Constitution of India, the challenge by the petitioner (original first defendant) is to the order dated 3rd February, 2007 passed by the learned Jt. Civil Judge, S.D. Kalyan by which the defence of the petitioner was struck out on account of failure of the petitioner to deposit the sum of Rs.7,68,000/- in terms of the order dated 4th May, 1995.

3. Apart from the other submissions, the

learned counsel for the petitioner pointed out that the learned trial Judge while passing the impugned order has relied upon the decision of this Court in the case of **Ratnakar D. Patade V/s. Smita Pandurang Dalvi & Ors. [1996 (1) Mh.L.J. 76]** which has been expressly overruled by a Division Bench of this Court in the case of Ramavatar Surajmal Modi V/s. Mulchand S. Modi [2004 (2) Mah.L.J. 1]. He submitted that the learned trial Judge has proceeded on an erroneous assumption that the provision of Rule 11 Order 39 of Civil Procedure Code,1908 is mandatory. The learned advocate for the respondents submitted that even going by the decision of the Division Bench of this Court, it was a clear case of wilful default on the part of the petitioners and, therefore, the trial Court was justified in passing the order of striking out the defence.

4. I have considered the submissions. Perusal of the impugned order shows that the learned trial Judge has placed reliance on the decision of the learned Single Judge of this Court in Ratnakar Patade (supra). The said Judgment takes a view that provisions of order 39 Rule 11 of the Code are mandatory. The said decision has been expressly overruled by the division of this Court in the case of

Ramavatar Surajmal Mode V/s. Mulchand Surajmal Modi [2004 (2) The Maharashtra Law Journal, 1]. The Division Bench has held that the said provision is directory and it is not mandatory. The Division Bench held that the said provision does not obligate to strike out the defence in every case of default. The Division Bench held that the power can be exercised where the default is wilful and the conduct of the defaulting party is contumacious resulting in serious prejudice to the opposite party.

5. The impugned order proceeds on the footing that the provisions are mandatory and, therefore, once breach of earlier order is established, the defence is liable to be struck out. The entire approach of the learned trial Judge is erroneous. Therefore, the impugned order will have to be quashed and set aside and the learned trial Judge will have to decide the application afresh in the light of the law laid down in the case of Ramavatar Modi (supra).

6. Hence I pass the following order.

i. Impugned order dated 3rd February, 2007 is quashed and set aside and the application Exh.232 in Special Civil Suit No.780/1996 is restored to the file.

The Trial Court will decide the said application afresh in the light of the decision of Ramavatar Surajmal Modi (supra).

ii. The said application shall be decided as expeditiously as possible and preferably on or before 31st July, 2007.

iii. All contentions of the parties on merits of the said application are expressly kept open.

iv. Writ Petition is partly allowed in above terms.

(ABHAY S. OKA, J.)